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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 59.

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of Weil & Thorp,

Petitioners,

against

EDWARD M. NEARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

LOUIS MARSHALL,
Respondent's Counsel.

The Harris Press, 320 Varick St., N. Y. Tel. Walker 1460.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 59.

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of Weil & Thorp,

Petitioners,

against

EDWARD M. NEARY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT.

The action was brought to recover from the defendants 40 per cent. of an amount received by them as compensation for services in the performance of which the plaintiff's assignor collaborated, the amount being fixed pursuant to the terms of an agreement between them.

The trial proceeded before Allen Wardwell, Esq., as Referee, who acted by authority of the order discussed under Point I. The trial was a protracted one, a great mass of oral testimony and exhibits having been introduced. The Referee rendered a decision in favor of the respondent, his Findings of Fact and Conclusions of Law being set forth in full at pages 2 to 6, *infra*. A motion was made for the confirmation of this report before Judge Goddard in the United States District Court for the Southern District of New York, and resulted in a decision confirming the report, and thereafter judgment was rendered in conformity therewith.

No bill of exceptions was allowed, signed or filed.

A writ of error was allowed to the United States Circuit Court of Appeals for the Second Circuit, where a unanimous judgment of affirmance was rendered by the Court, consisting of Circuit Judges Manton, Learned Hand and Swan. The opinion appears on pages 175-183 of the Record.

No opinion was written by Judge Goddard. The opinion of the Referee is to be found in the Record on pages 48-74.

The brief of the petitioners fails adequately to indicate just what the Referee's Findings of Fact are, although, even under the view most favorable to the petitioners they are controlling. We are therefore constrained to quote at length these incontrovertible findings, on which are based the Referee's legal conclusion that the petitioners are jointly and severally indebted to the plaintiff in the sum of $57,064, with interest from November 15, 1920 (*Rec., pp.* 108-114).

The Referee's Findings of Fact.

After showing that the defendants were lawyers engaged in practice at Pittsburgh, Pa., and that Mr. Samuel Untermyer, the plaintiff's (respondent's) assignor, was engaged in the practice of the law in New York City, that before the commencement of this action he had assigned and transferred to the plaintiff all of his right, title and interest in and to the cause of action set forth in the complaint and amended complaint herein, and that the plaintiff is the owner thereof (*Rec., p.* 109), the Referee found as facts:

> "4. Prior to the month of August, 1917, and in or about 1915, plaintiff's assignor was retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pa., where he was engaged in the business of a banker and in the operation of coal mines, to enable the said creditors to collect from the said

Thompson and out of his property his indebtedness to them, which amounted to many millions of dollars. *The affairs of the said Thompson were greatly involved, and it was agreed in the interests of his creditors that the extensive properties of the said Thompson should be conserved so that they might be applied equitably to the payment of the claims of his creditors*" (*Rec., p.* 109, *fol.* 166).

"5. On or about January, 1915, such proceedings were had that receivers of the estate of said Thompson were appointed by the Court of Common Pleas of Fayette County, Pennsylvania, and during the pendency of such receivership said estate was protected from being disrupted by the action of hostile lienors who sought to dispose of its assets under circumstances which would have resulted in a sacrifice of the interests of the creditors of said Thompson, and *such assets were conserved principally through the instrumentality of plaintiff's assignor, who represented from 90% to 95% of the creditors of said Thompson, whose claims aggregated approximately $15,000,000.00*" (*Rec., pp.* 109, 110).

"6. The receivership aforesaid having been set aside by virtue of a decision of the Supreme Court of Pennsylvania on May 7th, 1917, plaintiff's assignor acting under instructions of the creditors by whom he had been retained and for the benefit of all of the creditors of the said bankrupt being satisfied *that the general creditors of the said Thompson could only be protected from the disruption, disintegration and sacrifice of the estate of said Thompson which would have resulted from forced sales on the foreclosure of mortgages and other liens and similar sales under execution upon judgments recovered against said bankrupt by the action of a court in bankruptcy, determined to institute such bankruptcy proceedings.* To that end he explained to defendants the facts relating to said estate and informed them of his plans looking to the *protection of the creditors and the conservation of the estate of said Thompson* and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding

and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five thousand ($5,000) Dollars" (*Rec., p.* 110, *fol.* 167).

"7. *Prior to said retainer of the defendants by plaintiff's assignor, the defendants had had no interest in, or connection with said Thompson, his Estate or his creditors*" (*Rec., p.* 110).

"8. Upon the understanding and agreement aforesaid, bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court for the Western District of Pennsylvania for his adjudication as a bankrupt, and thereupon such proceedings were had, that on or about September 10, 1917, the said Thompson was adjudicated a bankrupt and trustees of his estate were duly appointed and the said Estate was thereupon administered in such bankruptcy proceedings, *the defendants herein acting at the instance of plaintiff's assignor and for the creditors represented by him whose interests were identical with those of the general creditors of the said Thompson*" (*Rec., p.* 110).

"9. *The affairs of the Thompson Estate were very complicated and the plaintiff's assignor was the person most conversant with them from the legal aspect. The trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendant's connection with plaintiff's assignor in relation to such creditors*" (*Rec., p.* 111, *fol.* 168).

"10. In the course of the administration of the Estate of the said Thompson, various complications arose which prolonged the period of the administration of the Estate beyond that contemplated at the time of the institution of the said bankruptcy proceedings and which rendered it necessary for the defendants *and plaintiff's assignor and of the firm of Guggenheimer, Untermyer & Marshall, who acted for the plaintiff's assignor, together to perform services, which in extent and laboriousness*

exceeded those which it was originally believed it would be necessary for the defendants to perform in the course of the administration of the said estate in bankruptcy" (Rec., p. 111).

"11. *Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that they should together perform such services and that the compensation of the defendants for services in such bankruptcy proceedings was not to be limited to the sum of Five thousand ($5,000) Dollars as theretofore stipulated, and in lieu of the compensation originally stipulated, it was mutually agreed that plaintiff's assignor and defendants should collaborate in rendering such services as were necessary and proper in such bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt and that the defendants were to receive for the services so to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him" (Rec., p. 111, fol. 169).*

"12. *The said agreement referred to in Finding 11 applied only to fees for services rendered in connection with the preservation of the bankrupt's estate against forced sales by mortgagees, judgment creditors and other lienors and the sale of the properties of the estate and did not apply to fees for services rendered in connection with the general administration of the estate after all of the properties embraced in the estate had been sold or otherwise disposed of" (Rec., pp. 111, 112).*

"13. Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor, and of Guggenheimer, Untermyer & Marshall, who acted for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor, by the trustees in bankruptcy upon the sale thereof, for which allowances*

were made in such bankruptcy proceedings by the District Court of the United States for the Western District of Pennsylvania to the defendants at various times, between September 3, 1918, and October 27, 1920, *to an aggregate amount received by them for such services of $142,659.98, a substantial part of the services for which said allowances were made having been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him*" (*Rec., p.* 112, *fols.* 169, 170).

"14. *On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 28th, 1920, the plaintiff's assignor on or about November 15, 1920, pursuant to the aforesaid agreement determined the division of the sum of $142,659.98, theretofore received by the defendants as aforesaid, was that the defendant should retain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision*" (*Rec., p.* 112).

"15. Thereafter the defendants refused to comply with his determination and although he demanded that they pay over to him 40% of the sum so received by them, they refused to pay him such sum or any part thereof, and they are now indebted to the plaintiff therefor in the sum of $57,064.00 with interest from November 15, 1920" (*Rec., p.* 112).

On the basis of these findings of fact the Referee as a conclusion of law determined that the petitioners were indebted to the respondent in the sum of $57,064, with interest from November 15, 1920, and directed judgment for that amount and costs, including Referee's and stenographer's fees.

In the presentation of the respondent's argument it will be contended:

(1) That the stipulation and order on which the reference to Mr. Wardwell was based made him an arbitrator whose determination is not reviewable.

(2) In the event that this proposition is not sustained, we next contend that if in the state of the record there

is anything that may be reviewed, it must be limited to a consideration of the proposition as to whether the Findings contained in the report of the Referee justify the Conclusions of Law awarding judgment.

Shipman v. *Straitsville Central Mining Co.*, 158 U. S. 356, 361.

Dooley v. *Pease*, 180 U. S. 126, 131.

David Lupton's Sons v. *Automobile Club*, 225 U. S. 489, 494.

Chicago, M. & St. P. Ry. Co. v. *Clark*, 92 Fed. Rep. 968.

Roessler & Hasslacher Chemical Co. v. *Standard Silk Dyeing Co.*, 254 Fed. Rep. 777.

United States v. *One Diamond Necklace*, 267 Fed. Rep. 696.

Aronstam v. *All Russian etc. Societies*, 270 Fed. Rep. 406.

(3) In that contingency it will be in order to discuss the two propositions presented by the petitioners, which will be considered under Points II and III (*infra*).

POINTS.

I.

The stipulation and order on which the reference herein was based, made the Referee an arbitrator, whose determination is not reviewable.

This cause was tried before Allen Wardwell, Esq., as Referee, under an order which provided:

> "Upon reading and filing the annexed stipulation and on motion of Guggenheimer, Untermyer & Marshall, attorneys for the plaintiff, it is
>
> ORDERED that the trial of the above entitled action be and the same hereby is referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same with all the powers to act and rule upon the said trial possessed by the Court" (*Rec., p.* 77).

The stipulation referred to, and on which the order was based, provided:

> "It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the trial of this cause be and the same hereby is referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same, with all the powers to act and rule upon said trial possessed by the Court" (*Rec., p.* 78).

It thus clearly appears that the stipulation contains no waiver of a jury as provided by Section 649 of the Revised Statutes. This, we contend, made the trial before the Referee an arbitration and that the determination reached is not reviewable.

Section 648 of the United States Revised Statutes provides for the trial of issues of fact by jury, with exceptions not here applicable.

Section 649 provides:

> "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, *whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury.* The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

This section is derived from the Act of March 3, 1865, Chapter 86.

Section 700 reads:

> "When an issue of fact in any civil cause in the circuit court is tried and determined by the court without the intervention of a jury according to section 649, *the rulings of the court in the progress of the trial of the cause, and if excepted to at the time and duly presented by a bill of exceptions*, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is spe-

cial the review may extend to the determination of the sufficiency of the facts found to support the judgment."

This section is likewise derived from the Act of March 3, 1865, Chapter 86.

In the present case there is no bill of exceptions. The only exceptions taken are those referred to above and none of them were to rulings of the Court in the progress of the trial and none of the exceptions were taken at the time the rulings were made.

Trials without a jury in actions at law in the District Court are now controlled by the provisions of Sections 649 and 700 of the United States Revised Statutes, formerly applicable solely to the Circuit Courts, which were abolished by Sections 289 and 291 of the Judicial Code and their powers transferred to the District Courts.

Ex parte United States, 226 U. S. 420.
Nashville Interurban Ry. v. *Barnum*, 212 Fed. Rep. 634.

Prior to 1912 a jury could not be waived in an action at law in the District Courts and a decision of such a cause tried without a jury was not reviewable in any event.

Campbell v. *United States*, 224 U. S. 99, 105.
Doty v. *Jewett*, 19 Fed. Rep. 337, 338.
Eastern Oil Co. v. *Holcomb*, 212 Fed. Rep. 126.

In *Nashville Interurban Ry.* v. *Barnum*, *supra*, Judge Rogers, speaking for this Court, after reviewing the statutes relating to the District and Circuit Courts and the effect of the abolition of the latter, said:

"It thus appears that as respects the Circuit Courts, express provision was made for a written waiver of a jury. In those courts *when a jury was waived by written stipulation* and the case was tried to the Court, the proceeding remained judicial, not being converted into arbitration. This

> left the findings of fact by the trial judge to be dealt with on writ of error in the same manner as the findings of a jury would be. * * * We must therefore accord to findings of fact, in a case tried to the Court without a jury, *there being a stipulation in writing waiving the jury*, the same effect as we would give to a verdict."

It will therefore be useful to consider the decisions relating to the effect of Sections 649 and 700 and the consequences of non-compliance therewith.

(1) *Under these provisions it has been the long established rule that whenever cases are submitted for trial without a jury, and a stipulation in writing waiving a jury has not been filed with the clerk, as provided in Section 649, the trial, if before a court or before a referee, virtually constitutes an arbitration, and a judge or referee who acts in the absence of such written waiver acts solely as an arbitrator. His decision is not reviewable.*

In *Duignan* v. *United States*, 274 U. S. 195, Mr. Justice Stone clearly stated the rule regarding the waiver of a jury trial:

> "The right to a jury trial may be waived where there is an appearance and participation in the trial without demanding a jury (*Kearney* v. *Case*, 12 Wall. 275; *Pereyo* v. *Dodge*, 163 U. S. 160, 166). Section 649 of the Revised Statutes provides that issues of fact may be tried by a court without a jury, *upon written stipulation of the parties*, and that the finding of the court upon the facts shall have the same effect as the verdict of the jury. But this section does not preclude other kinds of waiver (*Kearney* v. *Case*, *supra*). *Its purpose and effect, when read together with Sections 648 and 700, is to define the scope of appellate review in actions at law without a jury. Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in the course of the trial or of the sufficiency of a special finding to support the judgment. See Law* v. *United States*, 266 U. S. 494, 496; *Cf. Fleischmann Co.* v. *United States*, 270 U. S. 349, 355, 356."

Even where a trial by jury *has been waived in writing* the appellate court is limited to the sufficiency of the facts found to support the judgment and to rulings excepted to and presented by a bill of exceptions.

> *Lewellyn* v. *Electric Reduction Co.*, 275 U. S. 243, 248.
>
> *Ingram-Day Lumber Co.* v. *McLouth*, 275 U. S. 471, 474.

In the present case there was neither a written waiver of trial by jury nor a bill of exceptions and the case comes within the rule laid down in *Duignan* v. *United States*, *supra*, and the decisions now collated.

> *Campbell* v. *Boyreau*, 21 How. 223.
> *Flanders* v. *Tweed*, 9 Wall. 425.
> *Kearney* v. *Case*, 12 Wall. 275.
> *Swift* v. *Jones*, 145 Fed. Rep. 489.
> *Ford* v. *U. S.*, 260 Fed. Rep. 657.
> *Dundee Mortgage Co.* v. *Hughes*, 124 U. S. 157.
> *Roberts* v. *Benjamin*, 124 U. S. 64.
> *Shipman* v. *Mining Co.*, 158 U. S. 361.
> *Thompson-Starrett Co.* v. *La Belle Iron Works*, 17 Fed. (2nd) 635; certiorari denied, 273 U. S.

To facilitate the examination of these cases by the Court, the liberty is taken of quoting from them, especially because they have sometimes been misunderstood.

In *Campbell* v. *Boyreau*, *supra*, Mr. Justice Taney said (*pp.* 226, 227):

> "The findings of issues in fact by the Court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this

Court, therefore, cannot regard the facts so found as judicially determined in the Court below, nor examine the questions of law as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the Court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impanelled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this Court cannot regard the facts found by the judge as having been judicially determined in the Court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed."

In *Flanders* v. *Tweed*, *supra*, Mr. Justice Nelson said:

"It is impossible to misunderstand the condition upon which, according to the act of March 3rd, 1865, the parties are authorized to waive a trial by jury, and substitute the Court, and, at the same time, save to themselves all the rights and privileges which belong to them in trials by jury at common law. *That condition is the filing with the clerk a written stipulation, signed by the parties, or their attorneys.* The necessity of this law, for the purpose designed, will appear by a reference to a few of the decisions of this Court. One of the latest is the case of *Campbell et al.* v. *Boyreau*. • • • *This case, and those referred to by the learned Chief Justice, establish beyond question that the act of Congress was essential in order to preserve to the parties submitting a cause to a trial before a Court, both as to law and fact, the benefit of a review or re-examination of questions of law in the appellate court.* • • •"

In *Kearney* v. *Case*, *supra*, Mr. Justice Miller, after referring to the provisions of the Act of 1865, which are now Sections 649 and 700 of the United States Revised Statutes, said:

> "The fourth section enacts that issues of fact in civil cases, in any Circuit Court of the United States, may be tried and determined by the Court without the intervention of a jury, *whenever the parties or their attorneys of record, file a stipulation in writing with the clerk of the court waiving a jury.* It then proceeds to prescribe the mode of finding the facts, and the effect to be given to such finding, and provides for a review of the case by this Court. The manner in which the record is to be prepared for this and the extent of the inquiry in this Court are specifically pointed out. The question arises on this statute whether this mode of submitting a case to the Court without a jury was intended to be exclusive of all other modes, *so that if there is no stipulation in writing waiving a jury*, there is error, for which the judgment must be reversed. Although the language of the section might admit of that construction, it is not the only one of which it is susceptible. As stated in the case already referred to, of *Flanders* v. *Tweed*, *the main purpose of the act undoubtedly was to enable the parties who were willing to waive a jury to have the case reviewed on writ of error when tried by the Court alone.* This was rendered necessary, as shown by Mr. Justice Nelson in the opinion in that case, by the former decisions, based on the idea that in such cases the Court did not sit as a court of law, but as *quasi arbitrators*. To remove this difficulty, the statute provided a mode by which the parties *who agreed to waive a jury* should have the benefit of a writ of error to the rulings of the Court on questions of law. The language of the section is that the stipulation may be *filed with the clerk of the court*, which is undoubtedly designated to enable the parties to make agreements in vacation; and it is required to be in writing, to prevent either party demanding a jury unexpectedly at the trial. * * * We cannot believe that Congress intended to say that the parties shall not, as heretofore, submit their cases to the Court

unless they do so by a written stipulation, *but that it was the intention to enact that if the parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation*, and must then ask the Court to make a finding of such facts as they deem essential to the review, and ask the ruling of the Court on points to which they wish to except. *If this is not done the parties consenting to waive a jury stand as they did before the statute, concluded by the judgment of the Court on all matters submitted to it.* This we understand to be the effect of the opinion in *Flanders* v. *Tweed*. But, although a written stipulation in the Circuit Court is essential to a review in this Court, is the presence of the agreement or its copy in the transcript sent here indispensable? A copy of it should come up, as observed by Mr. Justice Nelson, and that is the more appropriate evidence of compliance with the statute. Still we are not prepared to say that if it shall affirmatively appear in any other part of the record proper that such a *writing* was made by the parties, that it will not be sufficient here. If, for instance, it is stated in the finding of facts by the court, or in the bill of exceptions, or in the record of judgment entry, that such a stipulation was made in writing, the record would show that the condition in which a review is allowed existed, and we would not feel at liberty to contradict the record in this respect. *In a case where there is no evidence that it was submitted in writing under the statute, but the record shows affirmatively that the parties waived a jury, we hold such evidence of waiver to be sufficient to support the judgment, but not sufficient to authorize a review of the rulings of the Court at the trial.* • • • The record before us presents, in the light of these views, a case where the parties consented to waive a jury, but did not take the steps necessary to secure the right to a review of the findings of the Court as provided by statute."

In *Swift & Co. v. Jones, supra*, Judge Waddill, speaking for the Circuit Court of Appeals for the Fourth Circuit, after quoting from Sections 648, 649 and 700 of the Revised Statutes, said:

> "These three sections constitute the whole Federal law upon the subject, so far as this case is concerned, where the facts were ascertained without the intervention of a jury * * * Such sections constitute within themselves a perfect and complete system for the guide and government of the Federal Courts, and ought not to be departed from. Nothing is better settled than that whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. * * * It is the duty of the trial courts to adhere rigidly to these enactments of Congress prescribed for their government, and the presumptions are all unfavorable to the waiver of the right of trial by jury; and whenever cases are submitted to them for trial without a jury, it must plainly appear that the waiver was made as prescribed by the act of Congress."

In *Dunder Mortgage Co. v. Hughes, supra*, Chief Justice Waite said:

> "The case therefore comes here upon the ruling at the trial by the Circuit Court without a jury, when there had been no waiver of a jury, as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk. Rulings of a Circuit Court made under such circumstances are not reviewable here. *Bond v. Dustin*, 112 U. S. 604, and the cases there cited."

In *Roberts v. Benjamin, supra*, an order was made in the Circuit Court referring the action to a Referee "to hear, try and determine the issues therein." The Referee filed a report finding facts and conclusions of law and directing a judgment for the plaintiff. The defendant applied to the Court for a new trial on the case and exceptions, in which he excepted to three of the conclusions

of law. There had been no waiver in writing of a trial by jury. On writ of error it was held that the Court could not review any exceptions to the admission or exclusion of evidence or any exceptions to findings of fact by the Referee.

See also:

County of Madison v. *Warren*, 106 U. S. 622.
Road District v. *St. Louis S. W. Ry.* 257 U. S. 547, 562.

The Circuit Court of Appeals for the Ninth Circuit has recently made like decisions:

Bouldin v. *Alto Mines Co.*, 299 Fed. 301.
Grover Corpn. v. *Hercules Gasoline Co.*, 16 Fed. (2nd) 459.

In *Thompson-Starrett Co.* v. *LaBelle Iron Works* (*supra*), where there was in fact "a written waiver of trial by jury subject to review by the appellate courts on appeal, writ of error or otherwise," Judge Learned Hand, speaking for this Court, said:

> "It is quite true that a reference 'to hear and determine,' even on written stipulation, is not such a trial [before the District Court]. • • • Such cases are in fact tried by an arbitrator, a practice known to the common law. *Hecker* v. *Fowler*, 2 Wall. 123. Moreover, though the referee does not decide the cause, but only reports to the court, if the consent is not by written stipulation as provided in Section 649, while the court decides the cause, it too acts as arbitrator, and the trial is not under Section 649. *Shipman* v. *Streatsville Mining Co.*, 158 U. S. 356, 361. It is only when the two conditions co-exist that Section 649 applies."

(2) *The State laws and practice are not applicable. The Act of Congress, which is explicit, controls. The Conformity Act does not come into play.*

Graham v. *Bayne*, 18 How. 60.
Kelsey v. *Forsyth*, 21 How. 85.
Erkel v. *United States*, 169 Fed. Rep. 623.
Swift & Co. v. *Jones* (*supra*).
Doty v. *Jewett* (*supra*).

In *Doty* v. *Jewett*, *supra*, Mr. Justice Blatchford said:

> "It is urged that the trial by the Court took place as it would have done in an equity suit; and that, as the case is one reviewable in one or the other of the two modes, the objection to the mode may be waived by the other side, and such waiver has taken place in this case. Some authorities under the State practice in New York are referred to. But the question is one of jurisdiction. The agreement of parties cannot authorize this Court to revise a judgment of the District Court in any other mode of proceedings than that which the law prescribes, nor can the law or practice of a State, in regard to the proceedings of its own courts, authorize this Court or the District Courts to depart from the modes of proceeding and rules prescribed by the acts of Congress. *Kelsey* v. *Forsyth*, 21 How. 85, 88; *Merrill* v. *Petty*, 16 Wall. 338, 347; *United States* v. *Emholt*, 105 U. S. 414, 416."

In *Erkel* v. *United States*, *supra*, decided by the Circuit Court of Appeals for the Ninth Circuit, Judge Gilbert, after referring to Sections 649 and 700 of the Revised Statutes and stating the terms of those sections, said:

> "Under that statute it has been uniformly held that if a case is tried before the Court without a jury, *and there is no written stipulation waiving a jury, none of the questions decided at the trial can be re-examined in an Appellate Court on writ of error.* • • •"

(3) *An oral waiver of trial by jury does not satisfy the statute. Nothing but a stipulation in writing waiving a jury will suffice.*

Illinois Surety Co. v. *United States*, 229 Fed. Rep. 527.
Madison County v. *Warren*, 106 U. S. 622.
Rush v. *Newman*, 58 Fed. Rep. 158.
Andes v. *Slawson*, 130 U. S. 435.

In *Illinois Surety Co.* v. *United States*, *supra*, Judge Rogers, speaking for this Court said:

> "The statutes require that issues of fact in actions at law be tried by jury (U. S. Comp. St., 1913, Sec. 1584), unless the jury be waived by a stipulation in writing (U. S. Comp. St., 1913, Sec. 1587), when the facts may be tried by the Court and its rulings may be reviewed as provided in the statute (U. S. Comp. St., 1913, Sec. 1068). This case having been tried without a jury, and there having been no written stipulation waiving a jury trial, it is well settled that none of the questions decided at the trial can be re-examined in this Court on writ of error."

In *County of Madison* v. *Warren*, *supra*, Chief Justice Waite said:

> "This is a case tried and determined by the Court without the intervention of a jury. The record does not show any stipulation in writing waiving a jury. The errors assigned all relate to rulings of the Court on the trial, excepted to at the time, and presented by a bill of exceptions. The rule is well settled, that if a written stipulation waiving a jury is not in some way shown affirmatively in the record, none of the questions decided at the trial can be re-examined here on writ of error."

In *Rush* v. *Newman*, *supra*, Judge Caldwell, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "There is in the record what purports to be a special finding of facts by the Court. But the rec-

ord does not show that the parties, or their attorneys of record, filed with the clerk a stipulation in writing waiving a jury, as required by section 649 of the Revised Statutes of the United States. The recital in the record that 'both parties in open court having waived a jury, and agreed to trial before the Court,' does not show a compliance with section 649. The following recitals in the record have been held insufficient for this purpose: 'The issue joined, by consent, is tried by the court, a jury being waived'; and 'the above cause coming on for trial, by agreement of parties, by the Court, without the intervention of a jury'; and 'the parties having stipulated to submit the case for trial by the Court without the intervention of a jury'; and 'said cause being tried by the Court without a jury, by agreement of parties'; and 'upon the trial of this cause before the Hon. S. H. Treat, sitting as circuit judge, a jury being waived by both parties'—*Bond* v. *Dustin*, 112 U. S. 604, 608, 5 Sup. Ct. Rep. 296; and 'jury waived tentatively,' and 'finding of facts and verdict'—*Merrill* v. *Floyd*, 2 C. C. A., 58, 50 Fed. Rep. 849. In the absence of a statute authorizing it, the finding of issues of fact by the Court is not a judicial act of which this Court can take any notice. *Campbell* v. *Boyreau*, 21 How. 223; *Rogers* v. *U. S.*, 141 U. S. 548, 12 Sup. Ct. Rep. 91; *Merrill* v. *Floyd*, 2 C. C. A. 58, 50 Fed. Rep. 849. The sufficiency of the facts found by the lower court to support the judgment can only be considered by this Court when a jury has been waived in writing, as provided in section 649. When a jury has not been thus waived, the facts found by the lower court cannot be noticed by the appellate court for any purpose, and the case stands as though the judgment of the lower court had been rendered on the general verdict of a jury; and the only question this Court can consider is the sufficiency of the declaration to support the judgment. *Flanders* v. *Tweed*, 9 Wall. 425; *Kearney* v. *Case*, 12 Wall. 275; *Alexander Co.* v. *Kimball*, 106 U. S. 623, 2 Sup. Ct. Rep. 86; *Bond* v. *Dustin*, 112 U. S. 604, 5 Sup. Ct. Rep. 296; *Campbell* v. *Boyreau*, 21 How. 223; *Merrill* v. *Floyd*, 2 C. C. A. 58, 50 Fed. Rep. 849."

In *Andes* v. *Slauson*, *supra*, an action at law was tried before a jury at the Circuit Court at chambers by con-

sent of the parties under an order providing that it should be so tried. After judgment was rendered the defendant sought to review it by bill of exceptions and writ of error. Mr. Justice Gray said:

> "The authority of this court to review the judgments of the Circuit Court by bill of exceptions and writ of error is regulated exclusively by the acts of Congress and the practice of the Courts of the United States, without regard to the statutes of the States or the practice of its courts. *Chatanooga Co., Petitioner*, 128 U. S. 544. The right of review is limited to questions of law appearing upon the face of the record, and does not extend to matters of fact or of discretion; questions of law arising upon the trial of an issue of fact cannot be made part of the record by bill of exceptions, unless the trial is by jury, *or by the court after due waiver in writing of a jury trial*; and when the trial is by rule of court and consent of parties before a referee or arbitrator, no question of law can be reviewed on error, except whether the facts found by him support the judgment below. *Campbell* v. *Boyreau*, 21 How. 223; *Bond* v. *Dustin*, 112 U. S. 604, 606; *Paine* v. *Central Vermont R. R.*, 118 U. S. 152."

See also:

James Dickinson Farm Mortgage Co. v. *Skinner*, 12 Fed. (2nd) 772.

Virginia Iron, Coal & Coke Co. v. *Woodside Cotton Co.*, 6 Fed. (2nd) 443.

II.

The petitioners' contention that the contract between them and the respondent's assignor was illegal and violative of public policy is without justification.

The correctness of the Referee's Findings of Fact above quoted *in extenso* cannot be challenged. They were made by a lawyer of great ability, vast experience and unques-

tioned fairness and integrity, than whom there is nobody at our bar possessed of higher ethical standards or a finer conception of professional ethics. They were confirmed by Judge Goddard in the District Court. The Circuit Court of Appeals after careful considered decided that they justified the conclusion of the Referee based on them and found no infraction of public policy.

As a result of the relation created on Mr. Untermyer's initiative between him and the petitioners, the latter first learned of the Thompson estate. At his instance they instituted the bankruptcy proceedings. They became the attorneys for the trustees in bankruptcy in the regular course of events without any agreement of any kind with Mr. Untermyer looking to their designation as such. They had the benefit of the exceptional information possessed by Mr. Untermyer with regard to the property and "the very complicated affairs" of the bankrupt, which was invaluable. They likewise had the advantage of his cooperation in respect to the many matters which arose in the course of the complications attendant upon the bankruptcy proceedings. There was no conflict of interest between the creditors represented by Mr. Untermyer and the comparatively small fraction of other creditors in like situation who were not represented by him. What was to the advantage of one inured equally to the benefit of every other creditor. By the joint efforts of Mr. Untermyer and the petitioners, who collaborated for the sole benefit of the creditors who together sought the welfare of all of the creditors alike, the bankrupt estate, on which the creditors had to depend for payment, was conserved, instead of being wasted and dissipated and the bankrupt's assets were ultimately distributed. Instead of increasing them, this method of procedure in reality reduced the expenses of the creditors. It assured them a maximum of protection and a minimum of expenditure. The allowances made out of the estate were sanctioned by the Court, and necessarily by the trustees, who "knew of defendants' connection with plaintiff's assignor in relation to such

creditors," and included the services rendered by and for Mr. Untermyer for which payment was received by the petitioners.

The agreement between these lawyers merely related to a division of the compensation allowed for the services rendered by the petitioners and respondent's assignor according to the latter's arbitrament.

The petitioners have rung the changes on the use by the Referee of the expression in Finding 8 (*Rec., p.* 110) and Finding 13 (*Rec., p.* 112), that the defendant rendered services to the bankrupt's estate under the "supervision" of plaintiff's assignor, in the sense that it was intended to ignore the trustees and the bankruptcy court. It is clear that the Referee had no such intention. It is evident that what was in the minds of all the parties was that Mr. Untermyer, who was to an extraordinary degree conversant with the affairs of the estate, was to exercise the "oversight" of counsel over the proceedings, not in a maleficient but a beneficent sense. The context shows this to be the fact. The Thirteenth Finding begins:

> "13. Pursuant to said agreement the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, who acted for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor by the trustees in bankruptcy upon the sale thereof, for which allowances were made, etc.*"

To attribute the doing or the contemplation of a sinister or improper purpose from such a transaction would taint the most innocent action. Such a course would be a reversal of well established legal principles.

In *Steele* v. *Drummond*, 275 U. S. 199, 204-206, in which the most recent pronouncement on the subject now under consideration was made, the principles applicable to the

defense that a contract is void as being contrary to public policy were carefully formulated. There it was claimed that a contract for the extension of a railroad was illegal as opposed to public policy because one of the parties agreed to procure the passage of ordinances in a town through which the railway was to run.

The rules there laid down may be summarized as follows:

> (*a*) It is only because of the dominant public interest that one who has had the benefit of performance by the other party is permitted to avoid his own obligation on plea that the agreement is illegal.
>
> (*b*) As respects the enforceability of a contract claimed to violate public policy it is a matter of great public concern that freedom of contract be not lightly interfered with.
>
> (*c*) It is only in clear cases that contracts will be held void as against public policy, since the principle must be cautiously applied to guard against confusion and injustice.
>
> (*d*) Detriment to public interest will not be presumed in a contract where nothing sinister or improper is done or contemplated.

In this connection it is proper to note, by way of contrast, the statement in the *Petitioners' Brief, p.* 14:

> "It is immaterial that the particular contract in controversy, as, for example, that here, is not tainted with a perverted motive • • •."

The decision in *Steele* v. *Drummond* is in line with overwhelming authority.

(a) *The burden of proof to show that an agreement is illegal or against public policy rests upon the defendant. The principle ut res magis valeat quam pereat applies with full force in such a case.*

Because of the importance of this proposition, we deem it desirable to collate a number of the leading cases in which this rule has been laid down.

In *Dykers* v. *Townsend*, 24 N. Y. 57, it was claimed that the contract was void as against the Stock Jobbing Act. The defense was overruled, Judge Hoyt saying:

> "On the contrary, the presumption is that the contract is valid until the contrary is shown by the defendant. Where a contract is apparently valid upon its face, the party seeking to impeach it must prove that it was made under such circumstances or for such purpose as to render it void, before the defense can be made available."

In *Curtis* v. *Gokey*, 68 N. Y. 300, it was claimed that the contract, which contained a covenant whereby a retiring partner bound himself not to engage in a certain business for a specified period of time or so long as the other party should continue the business, was in restraint of trade. The defense was rejected, Judge Allen saying:

> "*The law will not presume an agreement void as illegal or against public policy when it is capable of a construction which would make it consistent with the laws and valid.*"

In *Ormes* v. *Dauchy*, 82 N. Y. 443, the contract sought to be enforced was made in this State to advertise a lottery in other States. There was no proof that such advertising was in violation of the laws of those States. The contract was, therefore, enforced, Judge Miller saying:

> "As there is no proof that the law of any other State was violated, and as the law will not presume an agreement void as illegal or against public policy when it is capable of a construction which would make it consistent with the laws and valid, it cannot be considered as illegal."

In *Richards* v. *Wiener Co.*, 207 N. Y. 59, an action was brought upon a contract made by a corporation to purchase its own stock. The action was defended on the ground that the contract was not enforceable under Section 664 of the Penal Law, which made it a misdemeanor for a director to apply any funds of the corporation "except surplus profits" to that purpose. There was no proof as to whether or not there were surplus profits. It was held that the defense could not be sustained, Judge Haight, quoting from the opinion of Mr. Justice Scott in the Court below (145 App. Div. 353) saying:

> "The law will not presume, unless forced to do so, that a person intends to do an illegal act. It will not, therefore, presume that the parties intended to make an illegal contract. The contract itself, therefore, was perfectly legal subject to certain limitations upon its enforceability. * * * In defending against plaintiff's attempt to enforce it the burden rested upon defendant to show that it would be illegal to do so, for there is no presumption one way or the other as to the existence of a surplus. The defendant assumed this burden but failed in sustaining it."

In *Appleton Co.* v. *Warbasse*, 92 Misc. Rep. 42, an action was brought by the plaintiff to recover expenses incurred in the defense of an action for libel brought against the plaintiff, the libel being contained in a book written by the defendant and published by the plaintiff. The basis of the action was a clause in the contract between the author and the publisher whereby the former agreed to hold harmless and defend the publisher against any suit, claim, demand or recovery by reason of any injurious or libelous matter alleged to be contained in the work. The defendant claimed that this clause of the contract was contrary to public policy. Mr. Justice Shearn, overruling the objection, said:

> *"The validity of the contract is to be determined as of the time when the parties entered into it. 'In order to invalidate the contract it should appear*

> *that the agreement itself contemplated illegal acts or acts condemned as against good morals or public policy. It is not sufficient that acts were done which might be condemned, but the test is the intention of the parties—what acts were contemplated by them to be performed in carrying out the agreement.' Drake* v. *Lauer*, 93 App. Div. 86, affd. 182 N. Y. 533."

Quoting from *Jewett Publishing Co.* v. *Butler*, 159 Mass. 517, the opinion proceeds:

> "In order, we think, to render the contract unlawful, it should appear that there was an intention on the part of the author and publisher to write and publish libelous matter, or that the author proposed, with the knowledge and acquiescence of the publisher, to write libelous matter, or that the contract on its face provided for or prompted an illegal act."

In *Oregon Railroad & Navigation Co.* v. *Dumas*, 181 Fed. Rep. 781, decided by the Circuit Court of Appeals for the Ninth Circuit, where, in defense of an action to recover damages for failure to supply cars for the transportation of plaintiff's apple crop, the defendant contended that the shipper was afforded discriminatory rates and that the contract was therefore illegal and void, the Court, in rejecting that defense, said:

> "There was nothing in its terms to show that the plaintiff was to receive more than his proportionate share of cars, or that others would be injured thereby. A court should declare a contract void as against public policy only when the case is clear and free from doubt, and the injury to the public is substantial and not theoretical or problematical."

In *People ex rel. N. Y. C. & H. R. R. R. Co.* v. *Walsh*, 211 N. Y. 90, it was contended that a contract between the railroad company and the State was invalid so far as it provided for the delivery to the former of a permanent

easement to occupy canal lands for railroad purposes. Judge Collin, dealing with that proposition, said:

> "The ascertainment of the substantial intent of the parties is the fundamental rule in the construction of all agreements (*Canal Co.* v. *Hill*, 15 Wall. 94). An agreement will not be adjudged illegal where it is capable of a construction which will make it valid (*Lorillard* v. *Clyde*, 86 N. Y. 384, 387; *Hobbs* v. *McLean*, 117 U. S. 567)."

In *Hobbs* v. *McLean*, 117 U. S. 567, just referred to, which was an action between partners for an accounting, which involved a settlement of profits and losses under a contract with the Government, it was claimed by the defendant that the contract of partnership was illegal because in violation of statutes which forbade all transfers and assignments of any claim upon the United States and the transfer of any contract or order or interest therein. Mr. Justice Woods, dealing with this contention, said:

> "But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of Section 3737; and if they can be construed consistently with the prohibitions of the section they should be so construed. For it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted."

In *Lorillard* v. *Clyde*, 86 N. Y. 384, 387, Judge Andrews said:

> "We think the complaint discloses a good cause of action. The presumption is in favor of the legality of contracts. The law does not assume an intention to violate the law, nor will an agreement be adjudged to be illegal where it is capable of a construction which will uphold it and make it valid."

In *Shedlinsky* v. *Budweiser Brewing Co.*, 163 N. Y. 439, Judge Gray said:

> "It is a generally accepted rule that when a contract is to do a thing, which cannot be performed without the violation of the law, it is void; but when it may be performed lawfully, as well as in violation of the law, it is valid; *in the absence at least, of proof that the intention of both parties was that the law should be violated.* The construction of a contract should be, when it is possible, in favor of its legality. * * * A lease, valid, as this was, upon its face, is not to be condemned as unlawful and, therefore, an unenforceable instrument, because the purpose for which the demised premises were to be used might, under certain circumstances, be within the prohibition of a statute. When the operation of the prohibition depends upon the proof and that is inconclusive upon the subject, then the obligation of the parties remains unaffected. *The presumption of a lawful intention must always prevail and the burden of overthrowing it is not met by him who asserts it by proof, which is quite consistent with a perfectly lawful purpose, however, demonstrating that, if effectuated in a certain way, it would contravene the law.*"

See also:

> *In re Ray*, 203 Fed. Rep. 418.
> *Joy* v. *Glidden Varnish Co.*, 83 Fed. Rep. 908.
> *Illinois Surety Co.* v. *O'Brien*, 233 Fed. Rep. 953.
> *Salmon* v. *Stillman*, 66 Fed. Rep. 677.
> *Milbank* v. *Jones*, 127 N. Y. 370.
> *Harris* v. *White*, 81 N. Y. 532.

It has also been frequently adjudged that if a contract can be performed in any legal method, it must be assumed that such method was contemplated and will be followed.

> *Richards* v. *Wiener Co.*, 145 App. Div. 353, affd. 207 N. Y. 59.
> *Burn* v. *Lee*, 156 Cal. 221, 229.
> *Cheerbrough* v. *Conover*, 140 N. Y. 382.

(b) *Not only have the defendants failed to prove an invalid agreement as the basis of this action, but the record shows unmistakably that there was no taint of illegality in the arrangement between the parties.*

The utter incongruity of petitioners' theory as to the legal effect of a failure to find as requested, which is considered at pages 57 to 60, *infra*, is indicated by the discussion on pages 26 and 28 of Petitioners' Brief. There reference is made to Defendants' Proposed Findings 15 and 16 (*Rec., p.* 95). These were "Refused" by the Referee. Upon this refusal is based the astonishing argument that by inevitable inference the Referee found as a fact the very propositions which he disapproved, and upon this wild theory the claim is sought to be substantiated that the agreement between plaintiff's assignor and petitioners was one conferring upon him "complete domination, control and direction" over the bankruptcy proceedings, that all fees received by the petitioners were to be held on his account, and that the petitioners were to abdicate as counsel for the trustees and to substitute Mr. Untermyer in their place, giving him the direction, control and supervision of such counsel, the respondents acting merely as his representative to represent the interests of his client.

This is an astonishing distortion of the facts as found, and merely illustrates how the entire record is sought to be garbled in order to interpret as an evil thing the express purpose of the parties, which was actually intended to redound to the benefit of every creditor and to prevent a preference of any of them over another. Petitioners' Brief (*p.* 16) unconsciously describes this kind of reasoning in the phrase: "The extent of the load of possibilities for evil is limited only by the exuberance of one's imagination." This is followed by alleged examples which have no more pertinence to the case disclosed by the record than would the unsubstantial fabric of a dream.

It is for this reason that, in order to limit these imaginative flights, we rest entirely upon the Referee's Findings

of Fact, which rejected the fancies, as well as the testimony, by which the petitioners sought to overthrow their contract.

Petitioners rely on three cases—*Fried* v. *Danziger*, 120 App. Div. 604; *Marsell* v. *Maires*, 203 App. Div. 646, affd. 236 N. Y. 516, and *Maguire* v. *Corvine*, 101 U. S. 108. We proceed to a consideration of these decisions.

(1) *Fried* v. *Danziger* (*supra*) differs from the present case *toto coelo*. There the firm of Danziger Brothers brought an action for a dissolution of the co-partnership. Henry Danziger, Jr., a *son* of one of the members of the firm, appeared for the plaintiff in the action. One Frank was appointed temporary receiver of the co-partnership assets and appeared by Baker & Schwartz, his attorneys, Schwartz *being also related to the parties to the action*. The plaintiff, representing various creditors of Danziger Brothers, caused a petition in involuntary bankruptcy to be filed. The co-partners appeared *and an adjudication followed*. The defendant, the attorney in the co-partnership action, and Schwartz, on behalf of the temporary receiver, proceeded to negotiate with the *plaintiff, after the adjudication in bankruptcy, to secure a discontinuance of the bankruptcy proceedings*, with the result that an agreement was entered into whereby the bankruptcy proceedings were to be discontinued *and Baker & Schwartz and Danziger were to proceed with the action previously brought for the distribution of the partnership assets*. It was part of the agreement that of the costs and allowances obtained by them in the action, 80 per cent. was to be paid to the plaintiff and 20 per cent. was to be retained by the attorneys in the equity suit. The terms of the agreement were carried out, the business of the partnership was liquidated, the creditors received less than 7 per cent. of their demands, *while the attorneys received upwards of $8,000 out of a total of $32,000 realized from the assets. The plaintiff claimed that he was to share the fees received by him with a number of creditors who were his clients.*

Analyzing the transaction, Mr. Justice Spring said:

"The other creditors were not cognizant of the preferential plan by which the creditors represented by the plaintiff were likely to receive a large percentage, while they would get a pittance of their claims. The attorneys for the receiver and Danziger assented to this agreement. *They desired at all hazards to control the administration of the insolvent estate. The Danzigers and Schwartz, the attorney for the receiver, were related, and the apparently complicated affairs of the co-partnership could be managed more in accord with their wishes if they were in entire joint control.* The conclusion is a reasonable one that the plaintiff took advantage of this desire, and as a condition of discontinuing the bankruptcy proceeding compelled a liberal exaction of Danziger and Schwartz. Notice was served on all the creditors of the insolvents of the discontinuance of the proceeding. *There is nothing, however, to indicate that these creditors, aside from those who were to gain preferentially, knew of the terms of the agreement, or were aware that some creditors were to receive indirectly a greater proportional share of the assets of the firm than the creditors who were not favored by being clients of the plaintiff.* • • •

There is, however, another element in the agreement which we believe is against public policy and in contravention of the just administration of the rights of the litigants by the courts. The parties to this agreement were all lawyers. Their arrangement was not that a specified sum or a definite proportion of the assets of the firm should be paid to the creditors who abandoned the bankruptcy proceeding. The pith of their agreement was that Danziger and Schwartz should continue the action for dissolution of the copartnership and obtain allowances from time to time by orders of the court, and of these allowances eighty per cent. should be paid to the plaintiff. • • • *In effect the agreement was that Schwartz and Danziger, the one representing the receiver and the other his relatives, the insolvent debtors, were to join together to procure as large allowances as possible, and then distribute them in accordance with the agreement.*"

The Court then quotes a letter from Danziger to plaintiff's representative, in which he says:

> "I believe it will be impracticable to ask for any allowance at the time of the hearing of this motion. *There is no doubt to my mind that some creditors will be represented in court. The estate in itself does not make the best of showings, and if on top of the argument over settlement comes a request for allowances, while I have no doubt it would be granted, still I think the amount would be materially affected. There is nothing that requires us to make this application on notice, and it is certainly for our best interests that the application be made to the judge in Chambers, and when the circumstances are most favorable to ourselves.*"

Commenting on these facts, Mr. Justice Spring continues:

> "*The scope of the agreement to us is convincing proof that it was expected by the parties to it that Schwartz and Danziger were to endeavor to swell the award for costs and services to the fullest extent.* The temptation to make undue efforts in this direction was manifest when they were to get only one-fifth of the sums realized. If the judge who granted the allowances had known of this agreement he would probably have insisted on a careful scrutiny of the sums asked for, and would have also required the creditors to be represented, and their assent procured to the agreement made by these attorneys."

In that case there was a palpable conspiracy between the parties to the arrangement to take advantage of the creditors, to exploit the estate for their own benefit and the benefit of preferential creditors at the expense of the general creditors.

In the present case the findings are convincing that neither the plaintiff's assignor nor the defendants had the slightest idea of swelling the amount of the fees allotted to the defendants, of giving any preference to any creditor, or of doing aught which would to the slightest

extent militate against the interests of any creditor. On the contrary it is shown that the sole desire was to protect the interests of all creditors.

(2) Petitioners lay great stress on *Marsell* v. *Maires*, 203 App. Div. 646, aff'd 236 N. Y. 516. An analysis of that decision will demonstrate that there is nothing in common between its facts and those now under consideration.

It there appeared that an involuntary petition in bankruptcy was filed against the Franklin Brewing Company about January 23, 1917, and that prior to that date the plaintiff was its attorney and was familiar with its affairs and the names of all of its creditors. It was then alleged:

> "*That thereafter the defendant herein requested plaintiff to assist him in electing and having appointed certain trustees of the said bankrupt corporation, and to thereafter aid in procuring the appointment of the defendant as attorney for said trustees* and to assist the said defendant in the event of his appointment as attorney for said trustees in all matters of litigation which he might be called upon to do by the said *defendant, and said defendant agreed with plaintiff herein that in the event of such appointment as aforesaid as attorney for the said trustees*, that he would pay to the plaintiff herein one-third of any and all fees and allowances that might be awarded to and received by him for his services as attorney for the said trustees."

It was further alleged that thereafter "the plaintiff herein used his efforts and assisted in procuring the election and appointment" of certain designated trustees, one of whom was the defendant's son, and that plaintiff urged upon such trustees the appointment of the defendant as their attorney, and that thereafter the defendant was duly elected and appointed attorney for the trustees.

Commenting on these facts, Mr. Justice Young said:

> "Clearly, the purpose of the agreement was to procure the election of certain trustees, *whose primary and controlling qualification was that, when*

elected, they would appoint defendant their attorney to conduct the litigation of the estate. * * * The agreement in question, if at all effectual, tested the fitness of the trustees, whose election was to be procured, *not by their qualifications as being men of intelligence, honesty and integrity, who would act solely in the interests of the creditors by whom they were elected, but the paramount and controlling consideration was that such trustees, and only such, would be elected, who would appoint the defendant their attorney. Otherwise, the agreement was meaningless. Plaintiff's compensation for the services to be rendered depended upon the accomplishment of that result. In other words, in order to earn such compensation, he must obtain two things: (1) Election of trustees who would appoint defendant their attorney; (2) defendant's appointment by them as such attorney. That was the essence of the contract, and, so far as its real purpose was concerned, nothing else was of the slightest importance.* Persons illiterate, dishonest, open to sinister influences or otherwise, might be elected pursuant to the agreement sued on, and if they fulfilled the requirements of that agreement by appointing defendant their attorney, plaintiff's compensation was earned, or at least the contingency which stood in the way of his obtaining such compensation was removed."

Here, respondent's assignor was not requested to assist the defendants in the election of trustees for Thompson or to procure the defendants' appointment as attorneys of the trustees; nor was there any purpose or intent on his part to do aught that would interfere with the rights and interests of Thompson's creditors or to foist upon them either trustees or attorneys who were actuated by any other consideration than that of the best interests of the creditors. In order that the ruling in *Marvell* v. *Maires* shall be applicable to the facts in this case, it would have to appear that the respondent's assignor and the defendants were both engaged in a scheme the paramount and controlling element of which was the election of only such trustees as would appoint the defendants as their attorneys, and that that scheme was carried into effect. No such purpose existed.

Every factor which led the Court to condemn the agreement which was sought to be enforced in *Marsell* v. *Maires* is absent here. In fact, whatever transpired between the respondent's assignor and the defendants fully conforms with the test laid down by Mr. Justice Young (203 App. Div. 646):

> "It is also true that they (the trustees) serve the interests of the creditors of the particular estate for which they are elected. In a broad sense the public is interested in securing the election of properly qualified trustees so that the due and proper administration of each estate shall be had solely for the benefit of those interested, and free from every other consideration. That this is the policy of the law is, I think, beyond dispute. We must, therefore, test the agreement between the parties hereby determining whether or not it is consistent with that policy."

The facts as found by the Referee show clearly and conclusively that neither of the parties in their relations, contemplated or actual, was moved by any idea other than that of subserving the interests of the creditors, and that nothing occurred which could be tortured into an arrangement which is the equivalent of that which fell within the ban of judicial displeasure in *Marsell* v. *Maires*. Mr. Untermyer was solely interested in the welfare of the creditors of Josiah V. Thompson. He was the counsel for a creditors' committee which was created about eighteen months before the institution of the bankruptcy proceedings. That committee represented approximately 95 per cent. of all of the unsecured creditors of Thompson and $14,000,000 of claims out of a total indebtedness of $15,000,000. A receiver had been appointed in the Court of Common Pleas of Pennsylvania in an attempt to conserve the assets of Thompson for the benefit of his creditors. The Supreme Court of Pennsylvania, however, in *Hodgsett* v. *Thompson*, 258 Pa. St. 85, decided, in 1917, that under the chancery practice of that State there was no authority for such a receivership. It thereupon became apparent that, in order to prevent the property from

being sacrificed and absorbed by the secured creditors, the only hope of protecting the unsecured creditors was by instituting bankruptcy proceedings.

Acting, therefore, solely in the interest of the creditors and for the purpose of conserving the assets, out of which alone they could expect payment, Mr. Untermyer reached the conclusion that their only hope depended upon the institution of bankruptcy proceedings, which would enable the United States District Court to administer the assets of the bankrupt for the benefit of *all* the creditors. He brought these facts to Mr. Weil's attention and requested him, in the interest of the creditors, to institute bankruptcy proceedings, and to that end to take the necessary steps to procure the adjudication and to prevent the property of the bankrupt from being dissipated and frittered away; as it would have been but for the institution of these proceedings. He indicated what he regarded to be the limit of compensation which Weil ought to receive for the services which were in contemplation, and the latter, recognizing the fact that this business came to him through Mr. Untermyer and that 95 per cent. of the unsecured creditors of Thompson were represented by the committee for which Mr. Untermyer was counsel, expressed his readiness to accept for his services in the proceedings which were to be instituted whatever sum Mr. Untermyer would regard as proper.

Weil represented no creditors; his services were not essential to the carrying out of the plan of the creditors' committee. Mr. Untermyer himself might have instituted the bankruptcy proceedings. It was, however, regarded convenient to have local counsel. It was necessarily understood that Mr. Untermyer would, wherever it was deemed desirable, co-operate with Weil, because of the fact that 95 per cent. of the unsecured creditors were represented by him, and that he would studiously follow and keep in touch with the proceedings and advise Weil with regard to them solely in the interest of all the creditors in whose protection he was deeply concerned.

To contend that such an arrangement is contrary to public policy, or that it comes within the decision in *Marsell* v. *Mairs*, or any similar case, is to disregard the express findings of the Referee. It cannot be seriously asserted that the arrangement made, to the remotest degree, approached that condemned in *Marsell* v. *Mairs*. Had there been such an arrangement, it must have preceded the appointment of the trustees and the designation of Weil as counsel. Every fact found contravenes such a theory.

That the trustees were chosen and that Weil was made one of their counsel without any action on the part of the respondent's assignor, further negatives the idea of an illegal contract to bring about the selection of Weil as counsel for the trustees.

(3) Nor is *Meguire* v. *Corwine*, 101 U. S. 108, on which defendants rely, in point. There it appeared that the plaintiff, Meguire, was in the service of the United States Treasury Department, which had designated him to select special counsel in the so-called "Farragut Prize Cases" which only restricted him to the selection of a man who was familiar with admiralty practice. He entered into a contract with Corwine whereby in consideration of his procuring Corwine's appointment as special counsel, the latter agreed to pay Meguire one-half of the fees which he might receive from the Government. This practically amounted to the sale of an office; a flagrant breach of Meguire's special duty as well as a breach of trust.

There is no parallelism in any respect between that case and the present.

(c) *Courts will not lightly condemn a contract as contrary to public policy. Such a defense is carefully scrutinized and can only be based on proof susceptible of no other than a malign interpretation.*

In *Hyams* v. *Stuart King* (1908), Kings Bench Div. 696, 710, Sir Gorell Barnes said:

> "It is necessary to avoid confusion between judicial and legislative functions, and although

there have been cases from which it would seem as if an almost unlimited right had been claimed by deciding cases according to the Judges' views of public policy for the time being, there is now more precision in dealing with questions of public policy. The doctrine by which contracts are held void as being against public policy must be applied with caution, and care must be taken not to lay down new principles of public policy without sufficient warrant. I will only refer to Lord Bramwell's judgment in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1892), Appeal Cas. 46, where he says: 'The first position of the plaintiffs is that the agreement among the defendants is illegal as being in restraint of trade, and therefore against public policy, and so illegal.' 'Public policy,' said Burrough, J. (*Richardson* v. *Mellish*, 2 Bing. 229, 252), I believe quoting Hobart, C. J., 'is an unruly horse and dangerous to ride.' I quote also another distinguished judge (more modern), Cave, J., 'certain kinds of contracts have been made void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as exponents of what is called public policy.' I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as a matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences?"

In the same case Lord Justice Farwell said (p. 727):

"The doctrine of public policy is regarded nowadays as one rather for the legislature than the courts, although the courts will not shrink from acting on it if the contract sought to be enforced leads to immorality or crime."

See also the language of Lord Halsbury in *Janson* v. *Driefontain Consolidated Mines, Ltd.*, 1902, App. Cas. 484, and of Baron Parke in *Egerton* v. *Lord Brownlow*, 4 H. L. Cas. 123.

(d) *There was nothing illegal in the agreement between the plaintiff's assignor and the defendants, whereby it was left to the determination of Mr. Untermyer as to what compensation the defendants were to receive, out of the allowance made to them by the Court, for the services rendered, especially in view of the fact that he actively collaborated with the defendants in the interest of the creditors and that as found by the Referee he was the person most conversant with the very complicated affairs of the bankrupt from the legal aspect* (*Rec., p.* 111, *fol.* 108).

Weil, as the appointee of the trustees, represented the creditors of the bankrupt, the trustees themselves acting for the creditors and the proceedings having been instituted for the benefit of the creditors.

In re Gordon Supply & Mfg. Co., 129 Fed. Rep. 622.

In re Hanson, 156 Fed. Rep. 717.

It goes without saying that a trustee in bankruptcy has the right to employ counsel where legal advice is necessary for the performance of his duties.

In re Stotta, 93 Fed. Rep. 438.

In re Abram, 103 Fed. Rep. 272.

In re Baber, 119 Fed. Rep. 520.

In re Champion Wagon Co., 193 Fed. Rep. 1004.

1 *Remington on Bankruptcy* (2nd ed.), pp. 714-721.

Indeed, it has been held to be error for a referee in bankruptcy to permit the creditors by a majority vote to select the attorney for the trustee, the right to make such selection being in him, subject only to control by the Court.

In re Columbia Iron Works, 142 Fed. Rep. 234.

The relations between trustee and counsel are merely those of client and attorney.

In re Abram, 103 Fed. Rep. 273.

There is no statutory restriction upon the power of the trustees to employ counsel, the generally accepted doctrine being, however, that the trustee shall not as a rule employ as counsel those who have represented or are representing adverse interests, as, for example, the bankrupt or his family. Here Mr. Untermyer had represented the creditors only, the same creditors who were represented by the trustees.

In *Keyes* v. *McKerrow*, 180 Mass. 261, it was even held that where there are no conflicting interests between the bankrupt and the trustee in bankruptcy, a contract between an attorney and such trustee for services in collecting debts due the bankrupt estate is not against public policy so as to prevent the attorney's recovery of a fee paid into court by the bankrupt on making a composition with creditors for services rendered to such bankrupt.

In other words, where no actual conflict is shown to exist it has not been regarded as inconsistent for the attorney for the trustee to represent the bankrupt as well. But no such feature exists in the present case.

In the absence of any finding showing adverseness of interest, it will not be presumed that the interests of part of the unsecured creditors are adverse to the other unsecured creditors.

In this connection, attention is directed to the 9th finding contained in the Referee's report (Rec., fol. 168, p. 111), namely, that the trustees in selecting the defendants (petitioners) as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendants' connection with plaintiff's assignor in relation to such creditors and to the further fact that with this knowledge the allowances in question were made to the defendants.

The general rule with respect to the payment of fees to the attorneys for the trustee was laid down in *In re Byerly*, 128 Fed. Rep. 637, where it was said:

> "There is no direct provision in the Bankruptcy Act for the payment of the fees of attorneys em-

> ployed by the trustee, but they come in as part of the administration of the estate like other necessary expenses."

To the same effect, see *Page* v. *Rogers*, 149 Fed. Rep. 194; 211 U. S. 575, 581.

In re Smith, 203 Fed. Rep. 369, decided by the Circuit Court of Appeals for the Sixth Circuit in 1913, holds that the general rule that a receiver should not employ the attorney of either party to the suit in which he is appointed applies to trustees as well, but that it is only when the trustee is acting adversely to one of the parties that there is any impropriety in his employing the counsel of the other. Judge Knappen said that where it had been the general practice in the district to permit the attorneys for the petitioning creditors or the attorneys for other creditors to act as attorneys for the trustee, except in cases where such attorneys represented interests adverse to those of the general creditors, the fact that the attorneys for the trustees represented certain creditors as well whose interests were not directly adverse or hostile to the general estate, did not disqualify them from representing the trustee so as to preclude an allowance for their services out of the estate. He also held that in the absence of a special finding and direct proof from which it appeared that the attorneys for the trustee had stipulated for their employment by the trustee in advance of his appointment, the Court of Appeals on review could not notice an objection to an allowance for the attorney's services to the trustee on that ground.

In the instant case, no such question could have arisen, by reason of the fact that no objection was at any time raised to the appointment of defendants.

In this connection, Judge Knappen says:

> "The question here concerns only claimant's right to compensation for services actually rendered so far as appears without protest by any creditor to the Court (either Referee or Judge) against the

> propriety of claimant's representing the trustee. Petitioner seems to have contented herself with protesting to the trustee * * *. We may remark in passing that if it was improper for claimants to contest Mrs. Smith's claim, it was likewise improper for Mrs. Smith's attorneys to contest the Holmes claim. The original question of propriety does not wholly depend upon whether or not compensation from the estate is asked * * *. In the absence of a rule or decision distinctly forbidding it, it would be unjust to put such a rule into effect and give it a retroactive effect."

Collier (p. 804) in discussing the employment of the attorney for the trustee and his compensation, says:

> "An attorney's right to compensation is incident to his employment. Whether it shall be paid out of the assets of a bankrupt estate is the question considered here."

In re Coney Island Lumber Co., 199 Fed. Rep. 197, Judge Chatfield said:

> "If more than one attorney or set of attorneys rendered these services, there shall be a division of the fee rather than duplication or multiplication. Hence, if one set of attorneys act for the petitioning creditors and are succeeded by others, or if the court sees fit or deems it necessary to allow some of the services on behalf of the petitioning creditors to be rendered by other attorneys, this will result in a division of the allowance and not increase its amount * * *. No attorney should be allowed to receive compensation for work not done by him but by some one else in his place under a too strict interpretation of the statute, nor should the amount of the allowance be increased to satisfy all the parties at the expense of the estate."

Remington says:

> "The statute is not directed against the *employment* of more than one attorney but against the allowance of more than one reasonable attorney fee" (Vol. II, p. 1979).

The petitioners claim that Rule V of the Rules of the United States District Court for the Western District of Pennsylvania forbade the arrangement made between the petitioners and respondent's assignor (*Rec., p.* 94).

That rule, however, has no possible relation to the subject. It merely provides:

> "Unless specially authorized by the Court, receivers and trustees in bankruptcy shall not retain *as their attorney*, the attorney of the bankrupt, of the petitioning creditors, of the persons applying for the appointment of a receiver, or of any creditor, and that the trustees shall not retain *as their attorney*, any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies."

It is not claimed that the respondent's assignor was appointed or retained as attorney by the trustees, or that he obtained proxies or voted upon the election of the trustees, or that he was the attorney for persons holding such proxies. Mr. Weil was retained as attorney by the trustees and his designation was undoubtedly authorized by the Court, for it made allowances to him for the services rendered to the trustees in the bankrupt estate. There is not a word in the rule which in any way restricted him in the choice of those who might assist him professionally and in an advisory capacity in the performance of his duties. It would be farcical to say that he was bound to forego the collaboration of the person most conversant with the conditions affecting the rights and interests of the creditors, or to suppose for a moment that the trustees or the Court would ignore the advantages flowing from such co-operation and watchfulness.

Referring to this rule, Judge Manton, speaking for the Circuit Court of Appeals (*Rec., p.* 180), said:

> "The purpose of Rule V and of the rule of the Supreme Court [which will be presently referred to] was not to prevent such employment. It was

> designed to avoid attorneys actively searching for professional employment in bankruptcy proceedings at their inception and later obtaining their assignment as attorneys for trustees. It was an abuse which sprang from such professional conduct which gave rise to the rule. At no time was an allowance made by the court to Mr. Untermyer, who came within the provisions of Rule V if he applied to the court for compensation. As stated, the finding below is that the defendants below realized that when they were agreeing with Mr. Untermyer for his services, they were consulting counsel for the committee of creditors and knew of his connection in relation to such creditors. His services were accepted; no objection was made to them when tendered. * * * At no time did Mr. Untermyer seek compensation from the bankrupt's estate for services rendered and thus come within Rule V or the General Orders of Bankruptcy promulgated by the Supreme Court."

The General Order in Bankruptcy, promulgated on April 13, 1925 (267 U. S. 614, 615), relating to the compensation of attorneys, receivers and trustees, was referred to by petitioners in the Court below. It is, of course, not retroactive. Nor has it any bearing here. It merely provided that *every attorney* seeking an allowance of compensation *from a bankrupt estate* for services rendered, shall file with the Referee a petition under oath, setting forth certain facts. The petition "is to be accompanied by an affidavit of the applicant, stating that no agreement had been made directly or indirectly and that no understanding exists for a division of fees *between the applicant and the receiver, the trustees, the bankrupt, or the attorney of any of them.*" In the absence of such petition and affidavit no allowance of compensation is to be made.

The respondent's assignor was not the receiver, or the trustee, or the attorney for the receiver or the trustee or the bankrupt. Consequently a transaction such as that now under review does not come within the scope of the General Order. It follows that there is nothing either in

the Bankruptcy Act or in the General Orders to prevent an attorney for a trustee from making any disposition that he desires of his fees and to divide them with any person not expressly excluded.

The sole interest of the plaintiff's assignor was that of the unsecured creditors. They did not represent the bankrupt, or any interest inconsistent with that of these creditors. Consequently there was a complete identity of interest, in so far as these bankruptcy proceedings were concerned, between the plaintiff's assignor and the defendants. It was, therefore, not only proper, but commendable, that they should co-operate and collaborate. Even though the defendants were the appointees of the trustees, they had the right to dispose of the compensation which they were to receive for the services rendered to the trustees in the course of the administration of the bankrupt's estate, in any way that they might see fit, and to avail themselves of the assistance of other counsel so long as the latter did not represent inimical interests and were united in the purpose of securing the best possible results for the unsecured creditors. The defendants had the right to take into consideration the fact that it was through the plaintiff's assignor that it was possible for them to be brought into contact with these bankruptcy proceedings, and that it was due to the confidence bestowed upon them by the plaintiff's assignor that they were enabled to carry on this lucrative piece of business. They likewise had the benefit of the exceptional familiarity with the bankrupt estate, the experience and advice of plaintiff's assignor and of his knowledge of the negotiations conducted by the creditors' committee for the advantageous sale of the bankrupt's assets for the benefit of his creditors. Indeed, it was these negotiations which finally culminated in the conveyance by the trustees of the bankruptcy's property to the great advantage of the creditors.

It is not pretended that there was any intention or understanding that the defendants were to make any charge against the trustees for a penny in excess of the value of the services which they rendered, or that they

in fact increased their charge in consequence of any arrangement or understanding with the plaintiff's assignors. It was, therefore, entirely proper and in accordance with the general custom prevailing among lawyers of high standing under like conditions, that the fees realized by the defendants out of this business were to be divided between the plaintiff's assignors and the defendants on the basis of the determination of Mr. Untermyer.

That such division of fees is lawful is expressly provided in subdivision 2 of Section 274 of the New York Penal Law, where, after forbidding certain acts by attorneys or counselors, out of abundance of caution it is declared:

> "But this subdivision does not apply to an agreement between attorneys and counselors, or either to divide between themselves the compensation to be received."

Matter of Fitzsimmons, 174 N. Y. 15.
Scolaro v. *Ash*, 137 App. Div. 667.

The validity of such agreements has been taken for granted in many cases.

In *White* v. *Polhamus*, 1 New York City Court 421, it was held that an agreement between two attorneys that if one would assist the other who was the salaried attorney of a corporation the salary would be divided between them, was valid.

It has likewise been held that the fact that one of the attorneys does substantially all the work will not entitle him to more than the agreed proportion where the other is ready and willing to serve whenever called upon.

Owen v. *Dudley*, 217 U. S. 488.

It is immaterial whether the client knew of the contract between the attorneys or not or whether he had any connection with it.

Arcock v. *Baker* (Tex.), 60 S. W. Rep. 273.

A general custom as to a division of fees between lawyers exists and has been enforced by the courts.

Parker v. *Gartside*, 178 Ill. App. 634.
Ford v. *Freeman* (Cal.), 180 Pac. Rep. 545.
Gill v. *Mayne* (Iowa), 162 N. W. Rep. 24.
Underwood v. *Overstreet*, 223 S. W. Rep. 152.
Smith v. *Waldrop*, 77 So. Rep. 331.

In *Candler* v. *Candler*, Jacobs, 225, Lord Chancellor Eldon held that an agreement by an attorney to pay a share of the profits of his business to another person, even though not an attorney, was not illegal.

It is true that under the law of New York the right to such division is confined to an agreement between attorneys. Yet this adjudication is valuable as indicating that it was not regarded as *malum in se* to enter into such an agreement. There it was sought to be claimed, under a statute, that such an arrangement was not lawful, but the Lord Chancellor said:

> "I should state that this statute, if the construction be such as is contended for, has been violated over and over again by the best men in the profession. It has happened to me to know that it is no uncommon thing for gentlemen leaving the profession to stipulate for an annuity payable out of the future profits. I have thought that consistently with the policy of the law agreements could not be made by which they could contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill or knowledge in their profession, but for a sum of money paid in advance. I knew that this would rip up many transactions, and I was happy that the Court of Kings Bench was of a different opinion, though I never could entirely reconcile myself to their doctrine."

The case to which he refers is *Bunn* v. *Guy*, 4 East 190, which involved a contract entered into by a practicing attorney to relinquish his business and to recommend his

clients to two attorneys for a valuable consideration. The Lord Chancellor referred this question for opinion to the Court of Kings Bench, where the Court, consisting of Lord Ellenborough and Justices Grose, Lawrence and LeBlanc, certified that the contract was good in law.

In *Watkins* v. *Sedberry*, 261 U. S. 571, it was held that a contract between an attorney and the trustee of a bankrupt estate, whereby the former undertook to recover property belonging to the estate and indemnified the trustee against damages and expenses, and the trustee agreed that any property so recovered should be chargeable with the expenses incurred by the attorney and the balance was to be equally divided between them, although on its face unenforceable, was not *malum in se*, and that the attorney was not thereby debarred from recovering on a *quantum meruit*. In that case the bankrupt objected to the allowance on the ground of champerty. The Court, however, made short shrift of the objections made to the allowance of compensation for the services rendered.

Here the amount received by the defendants out of the bankrupt estate was allowed by the court. At *Rec., p.* 112, *fol.* 170, it was found by the Referee that "*a substantial part of the services for which said allowances were made*" had "*been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him.*" It is not pretended that the amount allowed by the Court to the petitioners exceeded the reasonable value of the services rendered. There is nothing to show that it was contemplated that the charges made were in any way to swell the expense of the administration of the estate. The fact that the plaintiff's assignor represented so large a proportion of the creditors was an earnest that no excessive payment would be sanctioned. The petitioners unquestionably had the right to divide the allowances made to them with a lawyer whose services were called into requisition and who was specially qualified to render valuable service by the fact that he was the person most conversant with the bankrupt's affairs.

The services for which compensation was awarded, which included those of the plaintiff's assignor, all inured to the benefit of the estate and were unitary. The findings of the Referee show that nothing was concealed from the trustees in bankruptcy, for it is found at folio 168, page 111, that the latter "in selecting the defendants as their counsel realized that they were selecting for the position counsel of the committee of creditors, who were represented by plaintiff's assignor, and knew of the defendants' connection with the plaintiff's assignor in relation to such creditors."

It does not, therefore, lie in the petitioners' mouths to contest the validity of the agreement which they made with plaintiff's assignor, nor would a court of its own motion prevent the fulfilment of the equitable agreement on which this action is based.

III.

The contract sued upon is neither vague nor indefinite in its terms. It was left to Mr. Untermyer to determine how the fees allowed to the petitioners were to be divided. His determination that the respondent's assignor should have 40 per cent. and the petitioners 60 per cent. of these fees is controlling, there being no pretense of bad faith.

The fact that the respondents' assignor was interested in the division of the amount allowed by the Court to the petitioners, in no manner affected the validity of the division.

In *Goltra* v. *Weeks*, 271 U. S. 536, 547-549, the question related to the termination of a lease by the lessor, the chief of engineers, for non-compliance by the lessee with the terms of the contract. In the course of the opinion Mr. Chief Justice Taft said:

> "*Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party*

to the contract alter the legal result. Of course the Chief Engineer is not the real party in interest. He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. But even if this were a stipulation between private individuals, judgment of one of the parties on such an issue would be, in the absence of bad faith, conclusive. There are many cases where the contract makes the satisfaction of one of the parties in respect of compliance the condition precedent to fulfillment, and good faith is all that is required to justify rejection of work or product tendered."

The cases referred to in the foregoing quotation are those which have enforced provisions contained in contracts for the erection of a building or for the construction of a railroad to the effect that performance shall be to the satisfaction of the architect or engineer or of the person or corporation for whom the work is done. They likewise include the familiar decisions which leave it to the determination of one of the parties to a contract as to whether or not the work done by the other in alleged performance of it has been completed to his satisfaction

Kihlberg v. *United States*, 97 U. S. 398.
Sweeney v. *United States*, 109 U. S. 618.
Chicago, S. F. & Cal. R. R. Co. v. *Price*, 138 U. S. 185.
Repley v. *United States*, 223 U. S. 695.
Rush v. *Jones*, 144 Fed. Rep. 942, 947.
Cope v. *Beaumont*, 181 Fed. Rep. 19.
J. H. Sullivan Co. v. *Wingerath*, 203 Fed. Rep. 460.
Robinson v. *United States*, 251 Fed. Rep. 461.
Thompson-Starrett Co. v. *La Belle Iron Works*, 17 Fed. (2nd) 536, 541; certiorari denied, 274 U. S. 748.
Payne v. *Roberts*, 214 Pa. St. 546.

This principle has been applied in a variety of cases.

In *Heyman Cohen & Sons, Inc.*, v. *M. Lurie Woolen Co., Inc.*, 232 N. Y. 112, the defendant entered into a contract to furnish specified merchandise to plaintiff, which further provided that *plaintiff* is given the "privilege * * * to confirm more of the above if (the defendant) can get more." It was held that the implication was plain *that the buyer was to fix the quantity* subject only to the proviso that the quantity shall be limited by the ability to supply. *In that case the buyer was the plaintiff.* Yet it was held that he could determine the quantity of merchandise to be supplied.

In *Moritz* v. *Eisner & Sons, Inc.*, 249 N. Y. 100, effect was given to a contract under which an employee was entitled to receive at the end of the period for which he was employed 10 per cent. of the net profits made during such period in a specified branch of the employee's business which made the employers "the sole arbiters to pass on and determine" "any differences of opinion" that should arise "as to the determination as to such net profits."

In *New England Trust Co.* v. *Abbott*, 162 Mass. 148, 38 N. E. 432, it was held that the contract between a stockholder and the corporation of which he was a member providing for the transfer of the stockholder's stock to the corporation *at a price to be fixed by the directors*, was valid. The Court said:

> "It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, *even though the party establishing it was interested;* provided the interest was known, and no objection made by the parties, *and no fraud or bad faith is shown.* Brown v. Bellows, 4 Pick. 179, 189; Palmer v. Clark, 100 Mass. 373, 389; Haley v. Bellamy, 137 Mass. 357, 359; Fox v. Hazelton, 10 Pick. 275; Strong v. Strong, 9 Cush. 569; Benj. Sales (6th Am. ed.), § 88, note 3."

See also:

Matter of Fletcher, 237 N. Y. 440.

Nor is there legal objection to a contract whereby it is left to the determination of one of the parties as to how a certain fund is to be divided. By this course the parties have provided a method whereby that which might otherwise be indefinite and uncertain is made definite and certain.

Jones v. *Roberts*, 113 App. Div. 285, aff'd 189 N. Y. 497.

Miscellaneous Precedents Upholding Contracts as Sufficiently Definite.

Attention is directed to the following contracts which were held to be sufficiently definite, all of them proceeding on the principle *id certum est quod certum reddi potest*:

A contract to purchase what the buyer required in his business.

Church v. *Proctor*, 66 Fed. Rep. 240.

A contract to purchase buyer's entire consumption of phosphate rock.

Loudenback Fertilizer Co. v. *Tennessee Phosphate Co.*, 121 Fed. Rep. 298.

A contract to buy all quebracho needed for the buyer's factory.

Klipstein v. *Allen*, 123 Fed. Rep. 992.

An agreement to take care of the buyer's needs for the year.

T. B. Walker Mfg. Co. v. *Swift*, 200 Fed. Rep. 529.

A contract to buy and sell buyer's "August requirements."

Jenkins v. *Anaheim Sugar Co.*, 247 Fed. Rep. 958.

A contract to buy all iron that the purchaser should use, need or consume in his business.

National Furnace Co. v. *Keystone Mfg. Co.*, 110 Ill. 427.

A contract to purchase buyer's requirements of coal.

Minnesota Lumber Co. v. *Whitebreast Coal Co.*, 160 Ill. 85.

A contract to give buyer's trade.

Warden Coal Washing Co. v. *Meyer*, 98 Ill. App. 640.

A contract to buy all ice which the plaintiff required for his hotel.

Smith v. *Morse*, 20 La. Ann. 220.

A contract to buy all ice which the seller might desire to sell.

Burgess Fibre Co. v. *Broomfield*, 180 Mass. 283.

A contract to buy all wheels that the purchaser might "want" during the ensuing season.

Cooper v. *Lansing Wheel Co.*, 94 Mich. 272.

A contract to buy all ice necessary to carry on the buyer's business.

Hickey v. *O'Brien*, 123 Mich. 611.

A contract to buy all the cans which the purchaser should use in its factory.

Dailey Co. v. *Clark Can Co.*, 128 Mich. 591.

A contract for a shipper's insurance business for a season.

Ames-Brooks Co. v. *Aetna Ins. Co.*, 83 Minn. 346.

A contract to purchase the "necessary brick, lime and cement which I may require at my two jobs."

Miller v. *Leo*, 35 App. Div. 589, aff'd 165 N. Y. 619.

A contract by buyers for "their supply" of certain drugs.

Asahel Wheeler Co. v. *Mendelson*, 180 App. Div. 9.

It will be observed that in most of the cases enumerated it was left to the buyer who sought to enforce the contract to determine what his needs were or how much of the merchandise he required during a stipulated period, and in all of these cases the contracts were held sufficiently definite to permit the person making the requisition to enforce his requirements.

Decisions Relied Upon by Petitioners.

The cases cited on behalf of the petitioners on this proposition have nothing in common with the facts of this case. In each of them the agreement sought to be enforced was palpably indefinite. There was nothing by which the compensation to be paid was determinable. Everything was left to the discretion of the defendant and he did not choose to make any determination as to the compensation to be paid. Here, however, Mr. Untermyer was to determine what the division should be, and he made the determination. It was left to his judgment.

Barker v. *O'Grady*, 163 N. Y. Supp. 594, involved an oral contract with the defendant under which he agreed to make "an equitable division" with the plaintiff of fees received by him. The plaintiff sought a recovery in an action at law. The defendant had made no division and there was, therefore, nothing on which to base a recovery.

In *McDonald* v. *Acker, Merrill & Condit Co.*, 192 App. Div. 123, the defendant agreed to pay "a liberal and very substantial bonus in addition to a stated salary." Here, again, all depended upon the action of the defendant, and it did not act. Had the agreement been one to pay the plaintiff the amount which the plaintiff should determine to be fair and just a different result would have followed.

Canet v. *Smith*, 173 App. Div. 241, involved an agreement "to pay to the plaintiff a reasonable amount from the proceeds to be realized from the sale of merchandise manufactured from (certain) secret processes." No method was provided for determining what was "a reasonable amount."

In *Featherstone* v. *Fowler*, 174 App. Div. 452, the defendant contracted to pay the plaintiff "for his time, his labor and his trouble." No method was provided in the contract for ascertaining the amount to be paid for the time, labor and trouble.

In *Bluemner* v. *Garvin*, 120 App. Div. 29, the defendant agreed that he "would fairly share with plaintiff the commissions received * * * on account of the contract with the City of New York." No method was provided whereby it was to be determined as to how the sharing would take place.

In *United Press* v. *New York Press Co.*, 164 N. Y. 406, the defendant agreed to pay plaintiff "a sum *not exceeding* $300 during each and every week that said news report is received" by the defendant. A sum not exceeding $300 might be nothing, or $1 or $5. Here, again, there was no method provided for determining the amount to be paid.

That this is the correct interpretation of the case just cited appears from the opinion of Mr. Justice Jenks in *Rosbach* v. *Sackett & Wilhelms Co.*, 134 App. Div. 130, where there was a contract of employment for a term of years at a salary "not less than $45 per week." That was held not to be indefinite.

In *Varney* v. *Ditmars*, 217 N. Y. 223, the agreement was: "If you boys will go on and continue the way you have been and get me out of this trouble and get these jobs started that were in the office three years, on the first of next January I will close my books and give you a fair share of my profits." Here, again, there was no method provided whereby the share of profits to which the plaintiff was entitled was to be determined.

The Ruling on Respondent's Thirteenth Request to Find.

Petitioners for the first time have raised a question which was not presented in the petition or brief on the application for writ of certiorari herein, namely, that the Referee in passing on respondent's thirteenth request to find (*Rec., p.* 106), omitted to find those portions of the request which are printed in brackets and that such portions were not found. This request, as it appears in the record is as follows:

> "On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 28, 1920, the plaintiff's assignor on or about November 15, 1920, pursuant to the aforesaid agreement [and after giving due consideration to the nature and character of the services rendered by the defendants and by himself and by the firm of Guggenheimer, Untermyer & Marshall, acting for him in the aforesaid bankruptcy proceedings], determined [in good faith that a fair and reasonable] the division of the sum of $142,659.98 theretofore received by the defendants as aforesaid, was that the defendants should retain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision [which were in all respects reasonable and equitable and commensurate with the relative services rendered as aforesaid]."

The finding as made by the Referee is Finding 14 (*Rec., p.* 112, *fol.* 170).

The petitioners have treated the ruling of the Referee (which is not presented by any bill of exceptions) as equivalent to a finding (which is not contained in the Report of the Referee) that the action of the respondent's assignor in making his determination as to the division of the moneys received by the petitioners, was not made in good faith, and that the determination was not fair and reasonable and commensurate with the relative services rendered by the petitioners and respondent's assignor.

This contention is not only directly contrary to the Report of the Referee, but is in direct conflict with the authorities.

Thus in *Galle* v. *Tode*, 148 N. Y. 270, it was squarely decided that the refusal to find a fact is not tantamount to a finding against a fact, unless the intention of the Court to be so understood is clearly apparent. That was an action by judgment-creditors to set aside judgments confessed by Tode and Wulling, on the ground of fraud. It was contended that Levi and Materne were parties and privies to the fraudulent intent of Tode and Wulling. There was, however, no direct finding to that effect. A finding was requested that Levi and Materne had no knowledge of the intent of Tode and Wulling to defraud their creditors and the request was refused. The Court of Appeals ruled as stated, adding:

> "The refusal to find may rest upon other considerations; the evidence may not be regarded as satisfactory either for or against, or the fact may not be regarded as material in the determination of the controversy."

In *Morehouse* v. *Brooklyn Heights R. R. Co.*, 185 N. Y. 521, 527, it was claimed that a contract was unconscionable and void. Requests to find were presented and the Court marked them "Refused." Commenting upon that state of the case, Judge Haight said:

> "But, assume that the provisions of Section 1023 of the Code had been re-enacted and were in force,

> and that an exception could be taken to the rulings made upon request and that such exception could be reviewed upon appeal; even then a refusal to find a fact requested is not equivalent to an affirmative finding to the contrary. If it were, a judgment might be based upon a decision made up wholly of refusals, thus completely nullifying the plain provisions of Section 1022 of the Code, which require that the decision must state separately the facts and conclusions of law and direct the judgment to be entered thereon. A judgment, therefore, must be based upon facts found, not facts refused. This precise question was considered by this court in the case of *Galle* v. *Tode*, 148 N. Y. 270-277."

In *Kavanaugh* v. *Commonwealth Trust Co.*, 223 N. Y. 103, 117, an action was brought against a director of a financial institution to recover losses sustained by the company through his alleged neglect of duties. There was no finding of neglect; likewise there was no finding that the losses were not due to the appellant's neglect. The Trial Court, however, refused a request to find that the appellant was negligent and that losses resulted therefrom. From this it was sought to infer that the Trial Court had found that the appellant was not negligent. As to this Judge Crane, speaking for the Court of Appeals, said:

> "But this is not a finding that he was not negligent, or that losses did not result therefrom. * * * A judgment must be based upon facts found, not facts refused."

It is to be observed that in the case now before this Court the request was not made by the petitioners, but by the respondent.

To the same effect is the decision in *Regen* v. *Pettus*, 223 N. Y. 662, 663.

Analogous in principle is the ruling in *United States* v. *Carver*, 260 U. S. 482, 490, where Mr. Justice Holmes said:

> "The denial of a writ of certiorari imparts no expression of opinion upon the merits of the case, as the bar has been told many times."

The omission of the portions of the proposed finding to which reference has been made proceeded clearly on the theory that the question of fraud or bad faith or of reasonableness was not in issue. The petitioners made no such claim, as is indicated by their requests to find, assuming that they are to be considered for any purpose.

In the opinion of the Referee (*Rec., p.* 72) he says:

> "The mere fact that the person who makes the determination is one of the parties to the contract and such interest is known *and no fraud or bad faith is shown* does not limit the power of the court to act."

Again (*Rec., p.* 73, *fol.* 114) the Referee says:

> "So here, the agreement that the amount to be allowed to the defendants was to be as much as Mr. Untermyer should fix, Mr. Untermyer having fixed the amount due, would seem to be enforceable in the absence of fraud or bad faith."

Finally, at *Rec., p.* 74, the Referee, referring to Mr. Untermyer's determination, says:

> "His determination, however, as to the proportion which he was to receive from the $142,659.98 payment seems to be conclusive in the absence of fraud or bad faith, and the Referee cannot say that such a decision, even in view of the fact that he had received other compensation specially allowed on the Piedmont sale to the Creditors' Committee and their counsel, was improper or excessive."

The burden of showing fraud or bad faith or unreasonableness in the determination of the arbiter rested on the

petitioners. It was for them to overcome the presumption of good faith. The testimony given on the trial is not brought up by any bill of exceptions, and no issue of fraud or bad faith on the part of the respondent was presented.

In *Gaines* v. *Nicholson*, 9 How. 356, 364, Mr. Justice Nelson invoked the universal rule that fraud is not to be presumed and that the burden of establishing it rests upon the party who claims it.

In *Jones* v. *Simpson*, 116 U. S. 615, in the course of his opinion, Mr. Justice Harlan remarked:

> "As the trial court stated, 'the law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and anyone who alleges that such acts are done in bad faith, or for a dishonest or fraudulent purpose takes upon himself the business of showing the same.'"

See also:

> *Farrar* v. *Churchill*, 135 U. S. 615.

In *Demarest* v. *Winchester Arms Co.*, 257 Fed. Rep. 162, 173, the Court said:

> "The universal rule is that fraud is never presumed. The legal presumptions are in favor of honesty and fair dealing. There can be no imputation of fraud when the circumstances and facts on which it is based are consistent with honesty and purity of intention * * *."

In *Long* v. *West*, 31 Kan. 298, 301, Mr. Justice Valentine said:

> "In the absence of evidence to the contrary, honesty and fair dealing in all transactions are always presumed; and if any person claims that there was fraud in any transaction, it devolves upon such person to prove the fraud, and it does not devolve upon the party charged with committing the fraud to prove that the transaction was honest and *bona fide*."

This language applies in the present case *a fortiori* since here there has been no charge of fraud or bad faith in the determination made by the respondent's assignor.

In *Barron* v. *International Trust Co.*, 184 Mass. 440, 68 N. E. Rep. 831, Mr. Justice Braley said:

> "Not only is fraud never presumed, but it must be affirmatively alleged and proved by the party who relies upon it either for the purpose of attack or defense. And nothing appears in the evidence recited in the record to show want of good faith by the defendant. If the plaintiff, in order to avoid the effect of this evidence, sought to charge the defendant or its officers with fraudulent conduct, it became his duty to so allege and offer some affirmative proof to overcome the presumption of fact that they had acted honestly."

It is evident that the Referee proceeded in reliance upon this principle, and it is to be presumed that there was nothing in the record which would have justified him to find affirmatively that there was fraud or bad faith or an unreasonable division.

IV.

It is respectfully submitted that the judgments of the Courts below should be affirmed.

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